Supreme Court, U. S.
FILED
APR 21 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Petitioners,

vs.

KATIE MAE ANDREWS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. F. SUMMER
Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

WILLIAM A. ALLAIN
101 Bankers Trust Plaza Building
Jackson, Mississippi 39201

CHAMP T. TERNEY, JR.
100 Court Street
Indianola, Mississippi 38751
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3080

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

Reasons for Granting the Writ—

I. The Writ of Certiorari should be granted since the district court's finding that the defendants' failure to employ the plaintiffs was based upon a constitutionally impermissible reason, i.e., the bearing of illegitimate children, conflicts with the Court's decisions in *Board of Regents* v. *Roth*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701, and *Perry* v. *Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 8

II. The Writ of Certiorari should be granted since the school district rule, neutral as to sex and race, does not violate the Due Process Clause and/or Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States 11

Conclusion 17

Appendix A—Decision, United States Court of Appeals for the Fifth Circuit (507 F.2d 611 (1975)) A1

Appendix B—Opinion, United States District Court for the Northern District of Mississippi (371 F.Supp. 27) A15

Table of Authorities

CASES

Adler v. *Board of Education*, 342 U.S. 485, 96 L.Ed. 517, 72 S.Ct. 380 ..... 13, 14
Beilan v. *Board of Ed. of Phila.*, 357 U.S. 399, 2 L.Ed.2d 414, 78 S.Ct. 1317 14
Board of Regents v. *Roth*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 ..... 8, 17
Boddie v. *Connecticut*, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 9
Cleveland Board of Education v. *LaFleur*, 414 U.S. 632, 39 L.Ed.2d 52, 94 S.Ct. 791 14
CSC v. *Letter Carriers*, 413 U.S. 548, 37 L.Ed.2d 796, 93 S.Ct. 2880 14
Ferguson v. *Skrupa*, 372 U.S. 726, 10 L.Ed.2d 93, 83 S.Ct. 1028 12
F.H.A. v. *Darlington*, 358 U.S. 84, 3 L.Ed.2d 132, 79 S.Ct. 141 11
Goss v. *Lopez*, ... U.S. ....., 42 L.Ed.2d 725, 95 S.Ct. 729 (No. 73-898, decided January 22, 1975) 3, 15
Labine v. *Vincent*, 401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017 10
McGowan v. *Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 12
McLaughlin v. *Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) 9
Meyer v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1924) 9
New York v. *O'Neill*, 359 U.S. 1, 3 L.Ed.2d 585, 79 S.Ct. 564 11
Perry v. *Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 ..... 8, 17

Peters v. *Kiff*, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163 18
Pickering v. *Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 14
Reed v. *Reed*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251 16
Roe v. *Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 1409 9
Salsburg v. *Maryland*, 346 U.S. 545, 98 L.Ed. 281, 74 S.Ct. 280 11
Schlesinger v. *Ballard*, ... U.S. ....., 42 L.Ed.2d 610, 95 S.Ct. 572 (No. 73-776) 16
Shelton v. *Tucker*, 364 U.S. 479, 5 L.Ed.2d 231, 81 S.Ct. 247 14
Skinner v. *Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) 9
Sosna v. *Iowa*, ... U.S. ....., 42 L.Ed.2d 532, ... S.Ct. ..... (No. 73-762) 10
Stanley v. *Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 16
United States v. *Raines*, 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519 16
Vlandis v. *Kline*, 412 U.S. 441, 37 L.Ed.2d 63, 93 S.Ct. 2230 12

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States—
Fifth Amendment 2
Fourteenth Amendment 2, 3, 11, 13
28 U.S.C. §1254(1) 2
28 U.S.C. §1343 8
42 U.S.C. §1981 3
42 U.S.C. §1983 3
42 U.S.C. §2000(d) et seq. 2

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Petitioners,

vs.

KATIE MAE ANDREWS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered February 3, 1975.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 507 F.2d 611 (1975). It appears hereto as Appendix "A". The opinion of the United States District Court for the Northern District of Mississippi, reported at 371 F.Supp. 27, is included as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 3, 1975. This Petition for a Writ of Certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a person has a right derived from or protected by the United States Constitution to bear illegitimate children.

2. Whether the failure to employ plaintiffs in defendants' school district because they were unwed parents of illegitimate children impinges upon some provision of the United States Constitution.

3. Whether a school district rule, neutral as to sex and race, which excludes parents of illegitimate children from consideration for employment as teachers or teacher aides in a small rural school district[1] violates the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. §§1981, 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000(d), et seq., and the Fifth and Fourteenth Amendments to the Constitution of the United States. The plaintiffs, both being single and parents of illegitimate children, sought an

1. The Drew Municipal Separate School District is a small school district located in a rural Mississippi Delta town. The town of Drew has a population of 2,574 individuals according to the 1970 United States Census Report.

injunction voiding the school district's rule which excluded unwed parents of illegitimate children, both male and female, from consideration for employment as teachers and teacher aides. The plaintiffs also requested the district court to require the defendants to enter into contracts of employment with them. The district court found the regulation to be unconstitutional as violative of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States[2] and required the defendants to execute contracts of employment with the plaintiffs.

The rule was adopted based upon the judgment that the role of a teacher, apart from imparting instruction, is to mold character and development through being a "role model." (Petty, Trans. p. 6) The rule was not promulgated to automatically deny consideration for employment as teachers and teacher aides of unwed parents of illegitimate children on the basis that such parents are immoral, but on the basis that such parents regardless of their present status of morality are improper models for the many roles occupied by the teacher—"educator, adviser, friend and, at times, parent-substitute"—during the formative years of primary and secondary education. *Goss v. Lopez*, ... U.S. ....., 42 L.Ed.2d 725, 95 S.Ct. 729 [No. 73-898], decided January 22, 1975 (Powell, J., dissenting).

The rule is rested on educational considerations; the superintendent's testimony is clear that educational reasons were involved. (Id., pp. 7, 8)

The superintendent's testimony concerning morals has been overworked and misapprehended by the lower courts.

2. The district court determined in the alternative that the rule was a sex-based classification and therefore inherently suspect, but the court of appeals did not address itself to this issue since it affirmed the district court "upon traditional equal protection grounds." Footnote 5 of Opinion of Court of Appeals.

The superintendent was not saying that the rule necessarily would separate the moral from the immoral in litmus paper fashion. Rather, his moral concern was that in the school year 1971-1972, twenty-eight girls ranging in age from thirteen to seventeen dropped out of school because of pregnancy. (Id., p. 8) He believed that the influences created by application of this rule would arrest this trend. Without insinuation that those who fell afoul of the rule were necessarily presently immoral, the superintendent believed that unwed parents of illegitimate children in teaching positions would add to rather than help arrest this alarming trend in his district. (Id., p. 9)

In this case of first impression, sociological and psychological testimony was preeminently important. The district court only paid lip service to the expert testimony, 371 F.Supp. 31, as being of a "judgmental nature unsupported by any studies that provide a solid factual basis for their conclusions." Shunning these important opinions of experts, the court rested its decision primarily on *a priori* assumptions as to the invalidity of the classification without considering how the classification works in practice. It is for this reason that the testimony of the experts, both pro and con, deserves considered attention.

Dr. Kenneth Clark, noted sociologist, while testifying for the plaintiffs, conceded much importance to "role modeling," wherein growing individuals derive models for their own behavior and attitudes and feelings from adults and teachers. (Deposition, p. 15) He further admitted that teachers not only communicate academic knowledge but communicate an approach to living and a style of life. (Id., p. 17) He acknowledged that anything which became a controversy or a point of notoriety would possibly affect students. (Id., p. 25)

Dr. Ernest van den Haag, scholar and writer in the fields of education, sociology and psychology, identified and elaborated upon a rational basis for the rule of the Drew Municipal Separate School District. He testified that the family and monogamous marriage are protected American institutions. (Deposition of Dr. van den Haag, p. 8) Sexual activities are and have been regulated within the social and legal norm of marriage. It then follows, according to Dr. van den Haag, that those who do not conform to the institution of marriage "are legitimately made to suffer some disadvantages, particularly if they deliberately fail to follow that institution." (Id., p. 8)

Teachers, in van den Haag's view, perform two functions: (1) They teach cognitive knowledge to their students, and (2) "transmit and, inseparably from this cognitive knowledge, the cultural heritage of the society or community in which they are employed." The cultural transmission role is particularly strong in the lower grades, since the primary influences on children are the home and the school. The emotional attitudes of the teacher are readily communicated to his students by the teacher's personality and conduct. The authority of the teacher turns on his acceptance by the pupil. The acceptance reaches the degree of receiving the teacher as a person wherein the students:

> "take as a model to some extent, and identify with and, in fact, in effect, build their own identity on the teacher's general conduct, behavior, etc., to the extent to which they are aware of it." (Id., pp. 9-11)

The importance of proper role models is central to Dr. van den Haag since "students seem to have sources of information that I never have been able to fully find out, but they seem to always know everything about their teachers." (Id., p. 11) Because Drew is a small town with a small school, Dr. van den Haag believed that "whether

by gossip or information or general curiosity about the lives of adults, that the students would know" about the private lives of their teachers. (Id., p. 13) There is an accompanying danger, according to van den Haag, that children fond of a particular teacher would accept that teacher totally and therefore accept her behavior that the surrounding community regards as unacceptable. (Id., p. 14) Dr. van den Haag believes that even arithmetic teachers in grade school will tend to communicate with the children on an emotional basis about everyday events and occurrences even within their own family. (Id., p. 16) It will simply be unavoidable that the teacher would express his own values in the classroom. Finally, van den Haag believes that education in the lower grades is not just a matter directed to the intellect:

> "Children learn and learn only because they like their teacher and wish to please him. Children learn for the love of the teacher, so to speak. This is less so as the children grow older, but it never stops. It is hard to learn from a teacher you don't care for; impossible for a young child, I would say." (Id., p. 18)

The teacher cannot teach any subject unless a child accepts him, likes him, and admires him. Along with role modeling there exists role assimilation in which children assume and learn to assume an identity of their own formed by and incorporating part of the personality, conduct and values of adult models.

Schooling as seen by Dr. van den Haag is an effort to impart the selected cultural heritage of the society of which one is a part. This cultural transmission is a selective process. All the bad traits of a national character such as propensity for crimes of violence should be avoided and ideas of honesty, proper behavior and restraint or avoidance of certain sexual practices, including those the subject of the regulation, should be taught. (Id., p. 24)

Dr. van den Haag also highlighted the emphasis of the rule upon status and not morality. In practice, it would be impossible to regulate whether a prospective teacher had extra or premarital sex. On the other hand, the status of having an illegitimate child will be readily observable in a town such as Drew.

The rule clearly regulates the situation of an individual having an illegitimate child rather than the situation of an individual engaging in premarital sex. (Id., p. 30)

Addressing the issue of the supposed severability of teachers' conduct from students' values and inferentially their sexual practices, Dr. van den Haag commented:

> "The impact varies with the degree of like and admiration that the students have for the teacher. But the impact is invariably great in elementary grade schools and up to, I would say, junior high school. . . . There are, I think, numerous biographies and autobiographies of people who report on the impact that an admired teacher had on their own development and personality. I think that it is indisputable that when you have daily and intimate and extended contact with a person much older than you and you are very young and plastic, so to speak, that person will, whether he wants to or not, influence you and participate in the formation of your personality." (Id., pp. 45-46)

The vital center of Dr. van den Haag's testimony is that children are sent to school to learn useful and accepted patterns of society and to internalize them. "They internalize them not so much by what the teacher formally teaches but what he is and does in their relation to him."

Since the Court of Appeals for the Fifth Circuit affirmed on limited grounds, there is no question before this Court in regard to whether the rule discriminates on the basis of race and/or sex.

REASONS FOR GRANTING THE WRIT

I.

The Writ of Certiorari should be granted since the district court's finding that the defendants' failure to employ the plaintiffs was based upon a constitutionally impermissible reason, i.e., the bearing of illegitimate children, conflicts with the Court's decisions in Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701, and Perry v. Sindermann, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694.

The district court lacked jurisdiction to consider these claims for employment. 28 U.S.C. Section 1343 requires the presence of a constitutional right. Where employment is denied or terminated, some protected interest in "liberty" or "property" rooted in the Constitution must be implicated to grant jurisdiction. *Board of Regents* v. *Roth,* supra. In the case of the new applicant, Rogers, there is no "right" to employment such as would confer jurisdiction; there is only a countervailing duty of the State not to infringe certain definable constitutional guarantees. Whatever actionable right to employment exists springs only from a constitutionally protected interest. Plaintiff Andrews, who was not rehired, has failed to allege the existence of any rules, tenure or understanding that "would justify any legitimate claim of entitlement to continued employment." *Perry* v. *Sindermann,* supra.

Both claims, if they lie, must rest on the asserted right to be free of barriers that penalize unwed parents of illegitimate children. Is such status constitutionally protected? If it is, it rests on some penumbral First Amendment right to complete liberty of procreation. True enough, certain activities relating to marriage are in this zone of

personal privacy, *Roe* v. *Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 1409, but the Court has confined this constitutional right to sexual activity within the confines of marriage. "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner* v. *Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Again, the rights growing from childbirth are ". . . the right of the individual to marry, establish a home, and bring up children." *Meyer* v. *Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1924). Plaintiffs have misread these cases and have in effect found a fundamental right to procreate outside marriage which does not exist. Where race is not a factor, states have a wide latitude in prohibiting illicit conduct, none of which could be characterized as constitutional. *McLaughlin* v. *Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964). Thus, this suit for employment must rise or fall on the existence of constitutional protection for the activity practiced. Unless this protection is present, the state may deny a benefit to a person without recourse.

Neither this Court nor any other court has ever placed its imprimatur upon the bearing of illegitimate children. Conversely, the Court has always recognized a sovereign's justified concern and interest in the sanctity, preservation and encouragement of marriage and has repeatedly upheld the sovereign's right to enact certain laws to that end, e.g., statutes dealing with bigamy, adultery, bastardy, etc.

Marriage is the very cornerstone of western civilization, and any element which might tend to erode this foundation is and should be of serious concern to all. The Chief Justice acknowledged for the Court in *Boddie* v. *Connecticut,* 401 U.S. 371, 374, 28 L.Ed.2d 113, 91 S.Ct. 780, "the basic position of the marriage relationship in this society's hierarchy of values."

Although writing in dissent in the same case, no member of the Court disagreed with Mr. Justice Black's characterization of marriage:

> "It is not by accident that marriage and divorce have always been considered to be under state control. The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children under laws passed by their elected representatives. The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages."

As recently as January 14, 1975, the Court again recognized the state's absolute and exclusive regulatory right in the area of marriage because of its importance to the continued existence of ordered society. *Sosna* v. *Iowa*, ... U.S. ....., 42 L.Ed.2d 532, ... S.Ct. ..... [No. 73-762].

Although the Court has never condemned the issue of illicit unions, it has in the past allowed a state law to stand against a constitutional attack, which law came down hard upon the illegitimate issue rather than the parents. *Labine* v. *Vincent*, 401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017.

II.

The Writ of Certiorari should be granted since the school district rule, neutral as to sex and race, does not violate the Due Process Clause and/or Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

There is perhaps no more basic precept of law than that the enactments of a legislative body are presumed to be valid. The burden of proving them invalid is a heavy one and rests squarely upon the plaintiffs in this case.

The Court in *F.H.A.* v. *Darlington*, 358 U.S. 84, 90, 91, 3 L.Ed.2d 132, 137, 79 S.Ct. 141, in addressing itself to the constitutional validity of a section of the National Housing Act, stated:

> "If we take as our starting point what the Court said in the Sinking Fund Case, 99 U.S. 700, 718, 25 L.Ed. 496, 501—'every possible presumption is in favor of the validity of a state statute, and this continues until the contrary is shown beyond a rational doubt.'—We do not see how it can be said that the 1954 Act is unconstitutional as applied."

The presumption of constitutionality of a statute is the postulate of constitutional adjudication. *New York* v. *O'Neill*, 359 U.S. 1, 3 L.Ed.2d 585, 79 S.Ct. 564.

In *Salsburg* v. *Maryland*, 346 U.S. 545, 550, 98 L.Ed. 281, 288, 74 S.Ct. 280, the Court announced that:

> "[W]e do not sit as a super legislature or a censor. 'To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify,

if they do not require, rough accommodations—illogical, it may be, and unscientific.' " (cases cited omitted)

In *McGowan* v. *Maryland*, 366 U.S. 420, 425, 426, 6 L.Ed.2d 393, 399, 81 S.Ct. 1101, Mr. Chief Justice Warren, speaking for the Court, enunciated that:

"[A]lthough no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Mr. Justice Black, speaking for the Court in *Ferguson* v. *Skrupa*, 372 U.S. 726, 730, 10 L.Ed.2d 93, 97, 83 S.Ct. 1028, stated that "[w]e have returned to the original constitutional purpose that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Further, at 372 U.S. 732, we find the admonition that "[s]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."

The Chief Justice in his dissent in *Vlandis* v. *Kline*, 412 U.S. 441, 462, 37 L.Ed.2d 63, 77, 93 S.Ct. 2230, recognized that:

"literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be

improved on by individualized determinations so as to avoid the untoward results produced here due to the very unusual facts of this case. Both the anomaly present here and the arguable alternatives to it do not differ from those present when, for example, a State provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred 'permanently and irrebuttably' from pursuing his calling, without ever having an opportunity to prove his personal skills."

The rule in question serves a legitimate state interest and has a rational relationship to such interest and does not conflict with the Fourteenth Amendment to the Constitution of the United States.

The Court announced in *Adler* v. *Board of Education*, 342 U.S. 485, 493, 96 L.Ed. 517, 524, 72 S.Ct. 380, that,

"[a] teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the State has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps."

The above referred to duty and right of a school district was reaffirmed in *Beilan* v. *Board of Ed. of Phila.*, 357 U.S. 399, 2 L.Ed.2d 414, 78 S.Ct. 1317.

When the Court was again called upon to address itself to the right and duty of a state in regard to public education and the employment of teachers, admonished that "[t]here can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize." *Shelton* v. *Tucker*, 364 U.S. 479, 485, 5 L.Ed.2d 231, 235, 81 S.Ct. 247. In support of this proposition, the Court cited *Adler* v. *Board of Education*, supra. Continuing, Mr. Justice Stewart, speaking for the Court, affirmed the proposition announced in *Beilan*, supra, that there is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors."

Although the Court in *Pickering* v. *Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731, upheld a teacher's right to criticize the school board (a First Amendment right not present in the action sub judice) in *CSC* v. *Letter Carriers*, 413 U.S. 548, 564, 37 L.Ed.2d 796, 808, 93 S.Ct. 2880, Mr. Justice White, speaking for the majority, recognized that *Pickering* stands for the proposition that "the government has an interest in regulating the conduct" of its employees significantly different from those it possesses in connection with the citizenry in general.

Mr. Justice Powell in his concurring opinion in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 656, 39 L.Ed.2d 52, 69, 94 S.Ct. 791, recognized that

> "[s]chool boards, confronted with sensitive and widely variable problems of public education, must be accorded latitude in the operation of school systems and in the adoption of rules and regulations of general application."

We submit to the Court that the rule promulgated by the Drew Municipal Separate School District does not operate against the present moral status of an individual school teacher or teacher aide, but operates against the example which such a teacher or teacher aide provides the students in the said school district. Both the district court and the court of appeals have opted for the position that an individual who seeks employment with the defendant school district should be given a due process hearing to determine whether or not his or her status as an unwed parent of illegitimate children would materially interfere with the educational processes of the school district. We suggest to the Court that such a hearing in and of itself would cause material disruption of the said educational processes and would avail little since it is not the present moral character of the individual that is in question but the individual's role in regard to the students attending school in the defendant school district. Mr. Justice Powell in his dissenting opinion in *Goss* v. *Lopez*, ... U.S. ..... [No. 73-898], decided January 22, 1975, joined in by the Chief Justice, Mr. Justice Blackmun, and Mr. Justice Rehnquist, properly stated the role of a teacher when he stated that:

> "The role of the teacher in our society historically has been an honored and respected one, rooted in the experience of decades that has left for most of us warm memories of our teachers, especially those of the formative years of primary and secondary education."

He further acknowledged that a teacher must occupy many roles, such as "educator, adviser, friend and, at

times, parent-substitute." Although speaking in another context, Mr. Justice Powell's recognition that "[w]e have relied for generations upon the experience, good faith and dedication of those who staff our public schools" is equally applicable to the situation now before the Court.

We suggest to the Court that the rule in question does not fall within the "irrebuttable presumption" category so often condemned by this Court, such as in *Reed* v. *Reed,* 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251, and *Stanley* v. *Illinois,* 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208. As acknowledged by this Court in *Schlesinger* v. *Ballard,* ..... U.S. ....., 42 L.Ed.2d 610, 95 S.Ct. 572 [No. 73-776], decided January 15, 1975, the classification challenged in *Reed* was based upon "administrative convenience, and that alone." The rule promulgated by the Drew Municipal Separate School District is not based upon administrative convenience but, as in *Schlesinger,* serves a legitimate state interest in the field of education.

The lower courts made much to-do about the rule applying in certain cases where the unwed parent of an illegitimate child had no control over the situation which created the condition and status, e.g., childbirth incident to criminal rape. These are not the facts before the Court in this case and therefore are of no moment. The Court in *United States* v. *Raines,* 362 U.S. 17, 21, 4 L.Ed.2d 524, 529, 80 S.Ct. 519, instructs that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or situations in which its application might be unconstitutional." In the case sub judice, the plaintiffs voluntarily engaged in the illicit conduct which brought them within the ambit of the rule and, as mandated by *Raines,* cannot now be heard to champion the rights of the innocent.

CONCLUSION

We suggest to the Court that the Writ should issue since the court of appeals decided a federal question in a way which conflicts with applicable decisions of this Court. *Board of Regents* v. *Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701, and *Perry* v. *Sindermann,* 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694. We submit to the Court that there is no right derived from or protected by the Constitution of the United States for unwed persons to bear illegitimate children. Therefore, the failure of defendants to employ instructional personnel based upon such status does not impinge upon a constitutional right.

Further, the court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, i.e., a school district's right and duty to promulgate reasonable rules in regard to employment of instructional personnel to meet special circumstances of the school district.

We further suggest to the Court that the questioned rule is constitutional and was so applied in this case. The defendant school district, faced with the grave problem of an alarming rate of increase as to illegitimate births among its students, properly applied a rule which had been formulated based upon the distilled wisdom of educators and others possessing expertise in this field. It is beyond cavil that teachers and teacher aides who have wilfully committed certain illicit acts, which acts have placed them into the status of unwed parents of illegitimate children, cannot function properly in their role as "educator, adviser, friend and, at times, parent-substitute." It is self-evident that such persons regardless of their present state of morality cannot serve as a proper "role model" for the children attending school in the Drew Municipal Separate School District. Again, we emphasize that the rule does

not concern itself with the present status of morality of an individual but serves the office of protecting the students from being subjected to improper "role models" in their educational training. The Court is on judicial record that in certain areas of human involvement, appearance is sometimes exalted over substance. The Court with Mr. Justice Marshall as its organ announced that:

> "Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the *appearance* of bias." *Peters* v. *Kiff*, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163. (Emphasis added)

If appearances rise to the dignity of constitutional recognition when an adult voluntarily or by fortune is placed in circumstances which may dictate his or her future for a finite period, can it be gainsaid that appearances (role models) are of even greater importance in circumstances of an individual during his or her formative years which dictate their entire future? Where lies the difference? If there be any, it is for the Court to say. Let the Writ issue.

Respectfully submitted,

A. F. SUMMER
Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

WILLIAM A. ALLAIN
101 Bankers Trust Plaza Building
Jackson, Mississippi 39201

CHAMP T. TERNEY, JR.
100 Court Street
Indianola, Mississippi 38751

Attorneys for Petitioners

APPENDIX

APPENDIX "A"

Katie Mae ANDREWS and Lestine Rogers, Plaintiffs-Appellants-Cross-Appellees,

v.

The DREW MUNICIPAL SEPARATE SCHOOL DISTRICT et al., Defendants-Appellees-Cross-Appellants.

No. 73-3177.

United States Court of Appeals, Fifth Circuit.

Feb. 3, 1975.

Two unwed mothers brought an action under federal civil rights statutes to have declared unconstitutional a rule of a school district under which unwed parents were ineligible to be hired as teachers' aides. The United States District Court for the Northern District of Mississippi, at Greenville, 371 F.Supp. 27, William C. Keady, Chief Judge, declared the rule unconstitutional but refused to award plaintiffs attorneys' fees, and cross appeals were filed. The Court of Appeals, Simpson, Circuit Judge, held that the rule had no rational relation to the objectives ostensibly sought to be achieved by school officials and that it was fraught with invidious discrimination and thus constitutionally defective both as a denial of equal protection and of due process.

Affirmed.

1. Constitutional Law (Key) 253(1)

Due process interdicts adoption by state of irrebuttable presumption as to which presumed fact does not necessarily follow from proven fact. U.S.C.A.Const. Amend. 14.

2. Constitutional Law (Key) 253(1)

If state investigates moral character of individual upon whom it intends either to bestow benefit or impose burden, due process requires that such inquiry look to present moral character. U.S.C.A.Const. Amend. 14.

3. Constitutional Law (Key) 253(2)

School district's rule under which present immorality was irrebuttably presumed from proven fact of unwed parenthood denies due process of law. U.S.C.A.Const. Amend. 14.

4. Constitutional Law (Key) 211

Where school district, by rule of its superintendent, refused to hire or retain teachers who were unwed mothers, policy denied unwed parents equal protection of laws by creating irrational classification under which such unwed mothers were denied public hearing to which all other teachers charged with immoral conduct were entitled. 28 U.S.CA. §§ 1343, 2201, 2202; 42 U.S.C.A. §§ 1981, 1983 et seq.; Code Miss.1942, § 6282—26; U.S.C.A.Const. Amends. 5, 14.

5. Constitutional Law (Key) 211, 253(2)

Insofar as rule under which school district refused to consider unwed mothers for hiring inextricably bound unwed parental status to irredeemable immorality, it violated both due process and equal protection of laws. U.S.C.A. Const. Amends. 5, 14.

6. Schools and School Districts (Key) 63(1)

School district's practice of refusing employment to unwed mothers was not justified on ground that it was necessary in order to create properly moral scholastic environment, because unwed parents are improper communal models after whom students might pattern their lives, or because presence of unwed parents in scholastic environment would materially contribute to school girl pregnancies.

7. Civil Rights (Key) 13.17

Where, in action by unwed mothers under federal civil rights acts challenging constitutionality of school district's rule prohibiting employment of persons with illegitimate children, plaintiffs alleged no violation of equal employment opportunity provisions of Civil Rights Act of 1964, trial court did not err in refusing to award plaintiffs attorneys' fees even though they were prevailing parties. 28 U.S.C.A. § 1343; 42 U.S.C.A. §§ 1981, 1983; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

Charles Victor McTeer, Greenville, Miss., Johnnie E. Walls, Jr., Willie L. Bailey, Greenwood, Miss., Lewis Myers, Jr., Oxford, Miss., Catherine P. Mitchell, Mound Bayou, Miss., for plaintiffs-appellants-cross-appellees.

Nancy Stearns, New York City, for Center for Constitutional Rights, amicus curiae.

A. F. Summer, Atty. Gen., Wm. A. Allain, 1st Asst. Atty. Gen., Heber Ladner, Jr., Jackson, Miss., Champ T. Terney, Jr., Indianola, Miss., for defendants-appellees-cross-appellants.

Linda Colvard Dorian, Wm. A. Carey, Gen. Counsel, Julia P. Cooper, Asst. Gen. Counsel, Washington, D. C., for Equal Employ.

Appeals from the United States District Court for the Northern District of Mississippi.

Before BELL, SIMPSON and INGRAHAM, Circuit Judges.

SIMPSON, Circuit Judge:

This suit attacking the validity of the Drew Municipal School District's rule against employing parents of illegitimate children was initiated by two such parents, both mothers, against whom the rule militated. Named as defendants were the Drew Municipal School District (the District), George Ferris Pettey, its Superintendent, and the individual members of the District's Board of Trustees (the Board).

The complaint sought declaratory and injunctive relief to "redress the deprivation of rights and privileges and immunities of the plaintiffs guaranteed by the (sic) 42 U.S.C. 1981, 1983 et seq., Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d et seq.,[1] the Fifth and

1. In paragraphs 11, 12 and 13 of the complaint, the plaintiffs detailed their claims of violations of their rights under the heading "VIOLATIONS OF LAW". The refusal by the defendants to employ plaintiff Andrews and the termination of the plaintiff Rogers was asserted to delegate the plaintiffs into an unconstitutionally created classification based upon their race, sex and unmarried parent status in violation of the constitutional and statutory provisions enumerated in the text, including Title VI of the Civil Rights Act of 1964, 42 U.S.C., Section 2000d. It was further alleged that Andrews was refused employment because of her race, sex and single parent status and that Rogers was discharged from her teachers' aide position because of her race, sex and single parent status, all in violation of the same constitutional and statutory provisions.

The district court's decision, Andrews v. Drew Municipal Separate School District, N.D.Miss.1973, 373 F.Supp. 27, contains no findings or conclusions with respect to violation of Title VI of the Civil Rights Act, Title 42, U.S.C., Sec. 2000d.

The complaint contained no assertion that Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunities provision, Title 42, U.S.C. § 2000e et seq., was violated. No assertion of any violation of Title VII was made during the district court proceedings, and the district judge made no findings or conclusions as to violations of Title VII.

Fourteenth Amendments to the United States Constitution. Plaintiffs further asked for declaratory relief under 28 U.S.C. Section 2201, 2202. Jurisdiction was invoked under Title 28 U.S.C. Section 1343.

Following a series of hearings the district court decided the case on the merits, holding that the rule violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Andrews v. Drew Municipal Separate School District, N.D.Miss.1973, 371 F.Supp. 27. We affirm for reasons stated below.

In the Spring of 1972, Superintendent Pettey learned that there were some teacher aides presently employed in the District who were parents of illegitimate children. Disturbed by this knowledge, Pettey immediately implemented an unwritten edict to the effect that parenthood of an illegitimate child would automatically disqualify an individual, whether incumbent or applicant, from employment with the school system.[2] There is no doubt that the policy is attributable solely to Pettey; there was no evidence that he sought either the prior advice or the consent of the Board.[3]

Mrs. Fred McCorkle is one of the administrators responsible for implementing the unwed parent policy. As Coordinator of Elementary Instruction for the school district, she is in charge of the teacher aide program and

2. Pettey in testimony indicated confusion as to the expanse of the policy he had promulgated. He was positive that the rule should apply to all instructional personnel. Upon questioning, he expanded the list to include not only teachers and teacher aides, but also secretaries, librarians, dieticians, cafeteria operators, nurses, social workers, school principals, school volunteers and even PTA presidents. Although he was not positive, he did not think the rule should apply to bus drivers, janitors or maids.

3. The Board and its individual members were unaware of the rule until the commencement of this action. The evidence indicates, however, that the Board then ratified the policy and all actions taken under it.

recommends to Pettey who shall be hired to fill teacher aide vacancies. All potential teacher aides must submit an application to Mrs. McCorkle who then interviews them and investigates their applications. The investigation consists of consultations with other administrative staff members as well as the principals of the various schools concerning their knowledge of the applicant.

Both plaintiffs-appellees, Lestine Rogers and Katie Mae Andrews, were victims of the unwed parent policy. Lestine Rogers was hired as a teacher aide in the Fall preceding the initiation of the rule, although her application stated that she was single and had a child. After the Pettey policy rule was announced, Mrs. McCorkle informed Ms. Rogers that because she was the parent of an illegitimate child, she would not be re-hired for the following year. Katie Mae Andrews, on the other hand, knew about the Pettey rule prior to applying for a teacher aide position. Although she too was the mother of an illegitimate child, she did not so indicate on her application. Mrs. McCorkle learned of Ms. Andrews' illegitimate child in the course of her investigation of the application. She made a written notation of her finding on the application,[4] and refused to consider Ms. Andrews further.

From the beginning, unwed mothers only, not unwed fathers, were adversely affected by the rule. This factor coupled with the conclusion that the policy, by its nature,

---

4. Across the top front of Ms. Andrews' application, Mrs. McCorkle wrote, "Single with a child 3 or 4." On the back of the application, Mrs. McCorkle wrote:

> "This applicant would have been hired in January 1973 if I had not received information from Mrs. Clara Robinson and others at James Elementary that she had a child. The applicant stated on her application that she was single and had no children. When she called by phone in January I informed her of the school policy and have had no contact with this applicant since then."

could only be applied against females, led the district court to hold alternatively that "assuming a rational relation does exist between the Drew policy and legitimate educational objectives, the rule creates an inherently suspect classification based on sex, i. e. single women, which cannot survive strict scrutiny mandated by the Fourteenth Amendment." 371 F.Supp. at 35. The district court's primary holding was that the rule "has no rational relation to the objectives ostensibly sought to be achieved by the school officials and is fraught with invidious discrimination; thus it is constitutionally defective under the traditional, and most lenient, standard of equal protection and violative of due process as well." Ibid. at 31. Thus this appeal concerns a policy or rule that has not only been held to violate equal protection for alternative reasons, but has also been held to violate due process. On the basis relied upon by the district court of traditional notions of equal protection, because the policy created an irrational classification, we affirm.[5]

"Traditional" equal protection analysis requires that legislative classifications must be sustained as long as the classification itself is rationally related to a legitimate governmental interest. United States Department of Agriculture v. Moreno, 1973, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782; Jefferson v. Hackney, 1972, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285; Weber v. Aetna Casualty & Surety Co., 1972, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768. To find the governmental objective ostensibly served by the rule, we turn to the testimony of Superintendent Pettey, the rule's originator and explicator. Pettey's

---

5. Because we affirm upon traditional equal protection grounds, we do not consider the district court's alternative finding of a sex based classification or its legal conclusion that such classifications are inherently suspect.

avowed objective was to create a scholastic environment which was conducive to the moral development as well as the intellectual development of the students. Certainly this objective is not without legitimacy. See Shelton v. Tucker, 1960, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; Adler v. Board of Education, 1952, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517. Schools have the right, if not the duty, to create a properly moral scholastic environment. See Beilan v. Board of Education, 1958, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414. But the issue is not simply whether the objective itself is legitimate, but rather whether the Pettey rule "advances that objective in a manner consistent with the Equal Protection Clause," Reed v. Reed, 1971, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225. We hold that it does not.

The District offers three possible rationales through which it asserts that its rule under attack furthers the creation of a properly moral scholastic environment: (1) unwed parenthood is prima facie proof of immorality; (2) unwed parents are improper communal role models, after whom students may pattern their lives; (3) employment of an unwed parent in a scholastic environment materially contributes to the problem of school-girl pregnancies.

[1-3] The first of these postulates violates not only the Equal Protection Clause, but the Due Process Clause as well. The law is clear that due process interdicts the adoption by a state of an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact. See Cleveland Board of Education v. LaFleur, 1974, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52; Vlandis v. Kline, 1973, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63; Stanley v. Illinois, 1972, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551. Thus, unless the presumed fact here, present

immorality,[6] necessarily follows from the proven fact, unwed parenthood, the conclusiveness inherent in the Pettey rule[7] must be held to violate due process. We agree with the district court that the one does not necessarily follow the other:

---

6. If a state investigates the moral character of an individual upon whom it intends either to bestow a benefit or to impose a burden, due process requires that such inquiry look to present moral character. Thus, in Schware v. Board of Bar Examiners of New Mexico, 1957, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796, the Supreme Court held that the New Mexico Board of Bar Examiners violated an applicant's due process rights by refusing to consider his evidence of present good moral character in disallowing him membership to the bar. The Board relied instead on negative inferences drawn from Schware's past, in that approximately fifteen years prior to entering law school, he was a member of the Communist party, made use of aliases and had an arrest record. In reversing the Board's denial of admission, the Court noted that "if (Schware) otherwise qualifies for the practice of law and is admitted to the bar, the State has ample means to discipline him for any future misconduct." 353 U.S. at 247, n. 20, 77 S.Ct. at 760, n. 20.

7. The conclusiveness of the Pettey rule was testified to by Superintendent Pettey himself:

> Q. So I take it, Mr. Pettey, that a person who supposedly has a, quote, illegitimate child, as you put it, that fact, no matter when it took place or no matter under what circumstances it took place, is prima facie evidence of a lack of morality:
>
> A. It would be to me, yes.
>
> * * *
>
> THE COURT: Mr. Pettey, you do not think the facts or circumstances under which an illegitimate birth occurred is at all relevant to the issue of good character or bad character?
>
> A. No. sir. That would be hard to get at. I think the fact that the birth occurred without the benefit of matrimony is, to me, proof enough of the . . .
>
> THE COURT: Is conclusive?
>
> A. Yes sir.
>
> * * *
>
> THE COURT: . . . Suppose a woman had an illegitimate child and then later married either the father of the child or another man. When she presented herself to you she showed she was married and had a child, one child. Would you consider her for employment?
>
> A. No, sir, I would not.

By the rule, a parent, whether male or female, who has had such a child, would be forever precluded from employment. Thus no consideration would be given to the subsequent marriage of the parent or to the length of time elapsed since the illegitimate birth, or to a person's reputation for good character in the community. A person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past. But human experience refutes the dogmatic attitude inherent in such a policy against unwed parents. Can it be said that an engaged woman, who has premarital sex, becomes pregnant, and whose fiance dies or is killed prior to their marriage, is morally depraved for bearing the posthumous child? The rule allows no compassion for the person who has been unwittingly subjected to sexual relations through force, deceptive design or while under the influence of drugs or alcohol, yet chooses to have the child rather than to abort it. The rule makes no distinction between the sexual neophyte and the libertine. In short, the rule leaves no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth. A past biological event like childbirth out of wedlock, even if relevant to the issue, may not be controlling; and that it may be considered more conventional or circumspect for the infant to be surrendered to others for upbringing rather than be reared by the natural parent is hardly determinative of the matter. Furthermore, the policy, if based on moral judgment, has inherent if unintended defects or shortcomings. While obviously aimed at discouraging prematerial (sic) sex relations, the policy's effect is apt to encourage abortion, which is itself staunchly opposed by some on ethical or moral grounds. It totally ignores, as a disqualification, the occurrence of

extra-marital sex activity, though thought of by many as a more serious basis for moral culpability. Indeed, the superintendent's fiat, altogether unsupported by sociological data, equates the single fact of illegitimate birth with irredeemable moral disease. Such a presumption is not only patently absurd, it is mischievous and prejudicial, requiring those who administer the policy to "investigate" the parental status of school employees and prospective applicants. Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it. 371 F.Supp. at 33-34 (footnotes deleted).

[4, 5] We observe also that there are reasonable alternative means through which to remove or suspend teachers engaging in immoral conduct; means that guarantee the teacher a public hearing on the merits and right of appeal. 5 Miss.Code Sec. 6282-26 (1971 Supp.).[8] By denying a public hearing to which all other teachers charged with immoral conduct are entitled, the policy denies unwed parents equal protection of the laws. Insofar as the rule inextricably binds unwed parental status to irredeemable immorality, it violates both due process and equal protection.

---

8. Sec. 6282-26 reads, in pertinent part:

Suspension of superintendent, principal, or teacher—notice—appeal.—For incompetence, neglect of duty, immoral conduct, intemperance, brutal treatment of a pupil or other good cause the county superintendent of education or superintendent of the municipal separate school district, as the case may be, may remove or suspend any . . . teacher in any school district, but before being so removed or suspended the . . . teacher shall be notified of the charges against him and he shall be advised that he is entitled to a public hearing upon said charges at a date to be fixed in such notice. . . . From the decision made at said hearing the . . . teacher shall be allowed an appeal to the state board of education . . . . Any party aggrieved by the said ruling of the state board of education may effect an appeal therefrom to the cancery court . . . .

[6] The school district urges a second rationale for its rule based upon the holding in McConnell v. Anderson, 8 Cir. 1971, 451 F.2d 193:

> "What the school board looks at is whether, moral considerations aside, proper educational growth can be furthered and respect for marriage ingrained by employing unwed parents. The question then becomes whether the open and notorious existence of the status as an unwed parent would injure the affected students." Reply Brief of Defendants/Appellants, p. 5.

McConnell, a male homosexual, had been offered a position at the University of Minnesota pending approval of the Board of Regents. While Board action was pending, McConnell and a male friend attempted to obtain a marriage license, an event which generated at least four local newspaper articles as well as local radio and television news coverage. Following this action the Board disapproved McConnell's appointment with the statement that his "personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."[9] 451 F.2d at 194. In upholding the Board of Regents' decision, the Eighth Circuit specified that McConnell was not denied employment because of his homosexual tendencies or his desire to continue homosexual conduct clandestinely, but rather because of his "activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals," which would have had the effect of forcing "tacit approval of this

9. We think it significant also that upon request, McConnell was given an opportunity to appear before the Board of Regents with counsel to present information claimed to support his application. It was only after this hearing that the Regents adopted the resolution to disapprove the appointment.

socially repugnant concept" upon the University. 451 F.2d at 196.

We do not consider *McConnell* supportive of the District's position. The record before us contains no evidence of proselytizing of pupils by the plaintiffs and reveals instead that each plaintiff, along with her illegitimate offspring, is living under the same roof as her parents, brothers and sisters. It would be a wise child indeed who could infer knowledge of either plaintiff's unwed parent status based on the manner of plaintiffs' existence. As the district court observed:

> "In the absence of overt, positive stimuli to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative. We are not at all persuaded by defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private family life-styles of teachers or other adults within a school system (i. e. whether they are divorced, separated, happily married or single, etc.), and, when known, will approve of and seek to emulate them." 371 F.Supp. at 35.

In our view then, the school district's second offered justification for the unwed parent policy also falls short of equal protection requirements.

The third rationale proffered by the school district in hopes of salvaging the Pettey rule, that the presence of unwed parents in a scholastic environment materially contributes to school-girl pregnancies is without support, other than speculation and assertions of opinion, in the record before us.

Because we hold that the Board rule under attack violated traditional concepts of equal protection, we find it unnecessary to discuss numerous other issues urged on appeal by appellees or in their behalf by *amici curiae;* for example, whether the rule creates a suspect classification based upon race or sex, or whether it infringes upon some constitutionally protected interest such as the right to privacy or the right to procreation.[10]

[7] Finally we find insufficient justification to reverse on cross-appeal the district court's denial of attorney fees.[11]

Affirmed.

---

10. Both the Equal Employment Opportunity Commission and the Center for Constitutional Rights filed *Amicus Curiae* briefs before this court urging that the basis for our decision be broadened to include some or all of these issues. Both Amici sought and were denied leave to participate in oral argument.

11. Despite his alternative ground of decision, discrimination as to sex in violation of the Fourteenth Amendment, the district judge denied the award of attorneys' fees in a separate order entered after his injunctive and declaratory decree. No reasons were assigned. Because of the strong congressional policy against unlawful discrimination in employment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e; Weeks v. Southern Bell Tel. & Tel. Co., 5 Cir. 1969, 408 F.2d 228, we would seriously consider reversal for failure to award attorneys' fees, if we could base our affirmance on that congressional policy's proper vindication. See Clark et al. v. American Marine Corporation, 5 Cir. 1971, 437 F.2d 959, affirming per curiam, Clark et al. v. American Marine Corporation, E.D.La. 1970, 320 F.Supp. 709; cf. Newman v. Piggie Park Enterprises, 1968, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263. But review of the finding of discrimination as to sex, especially since no Title VII violation was asserted by the pleadings or dealt with by the trial court (Note 1, supra) presents a thicket we deem it unwise to enter. In the procedural posture which has evolved, we perceive no error in the refusal to award attorneys' fees.

APPENDIX "B"

Katie Mae ANDREWS and Lestine Rogers, Plaintiffs,

v.

The DREW MUNICIPAL SEPARATE SCHOOL DISTRICT et al., Defendants.

No. GC 73-20-K.

United States District Court, N. D. Mississippi, Greenville Division.

July 3, 1973.

Civil rights action brought against school district, its trustees and superintendent, seeking declaratory and injunctive relief to redress alleged deprivation of rights and privileges guaranteed by Fourteenth Amendment. The District Court, Keady, Chief Judge, held that policy of barring an otherwise qualified person from being employed, or considered for employment, in public schools merely because of person's previously having had an illegitimate child had no rational relation to objectives ostensibly sought to be achieved by school officials and was constitutionally defective as denying equal protection, violating due process and constituting impermissible discriminatory classification based upon sex, and that discharge of one teacher's aide and refusal to employ an applicant for the same position, without any inquiry into their good moral character, but solely because they they were unwed mothers was improper.

Judgment for plaintiffs.

1. Schools and School Districts (Key) 63(1), 133

Public school officials have authority to adopt reasonable employee qualification criteria, including possession of good character traits, applicable to administrators, teachers, staff and public school employees generally.

2. Schools and School Districts (Key) 63(1)

Subject to constitutional and statutory limitations, school officials are to be afforded leeway in imposing employee qualifications to suit particular needs of school or school districts involved.

3. Schools and School Districts (Key) 63(1)

No school administrator or board should be precluded from denying employment to anyone determined to be of bad moral character upon fair and unbiased consideration of pertinent information.

4. Civil Rights (Key) 9.14
Constitutional Law (Key) 224, 275(1)

Policy of barring an otherwise qualified person from being employed, or considered for employment, in public schools merely because of person's previously having had an illegitimate child had no rational relation to objectives ostensibly sought to be achieved by school officials and was constitutionally defective as denying equal protection, violating due process and constituting impermissible discriminatory classification based upon sex. U.S.C.A.Const. Amend. 14; 28 U.S.C.A. § 1343; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; 42 U.S.C.A. §§ 1981, 1983.

5. Constitutional Law (Key) 211, 275(1)

State cannot exclude person from profession or occupation in manner or for reasons that contravene due process clause or equal protection clause. U.S.C.A.Const. Amend. 14.

6. Constitutional Law (Key) 277(2)

Discharge of teacher's aide and refusal to consider woman for employment as such solely because they were unwed parents denied them due process rights. U.S.C.A. Const. Amend. 14.

7. Schools and School Districts (Key) 133

Exclusion of unwed parents from employment in school district was not justified on theory that their mere presence in educational environment might adversely affect morals of school children and enhance likelihood of schoolgirl pregnancies, in absence of evidence that unwed mother who had been discharged from her position as teacher's aide or unwed mother who had been refused employment or other unwed mothers had been attempting or would have attempted to proselytize students. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; 42 U.S.C.A. §§ 1981, 1983.

8. Schools and School Districts (Key) 63(1), 133

In absence of showing of proselytization, policy of excluding unwed parents from employment by school district was not justified on theory that it was imperative for teachers and other school employees to project a "proper" image to students of impressionable age and that students were apt to seek out knowledge of personal and private family life-styles of teachers or other adults within school

system and, when known, would approve of and seek to emulate them. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; 42 U.S.C.A. §§ 1981, 1983.

9. Constitutional Law (Key) 238(1)
Schools and School Districts (Key) 63(1)

School district's policy of not hiring unwed parents was not justified on basis that it permissibly sought to regulate a "status" situation, inasmuch as "parental status" as a basis of classification was no less offensive to Fourteenth Amendment than other classifications arbitrarily and unreasonably made by or on behalf of the state. U.S.C.A.Const. Amend. 14.

10. Constitutional Law (Key) 208(3)

Where state has adopted a suspect classification like sex, it bears a heavy burden of justification. U.S.C.A.Const. Amend. 14.

Charles Victor McTeer, Mound Bayou, Miss., for plaintiffs.

Champ T. Terney, Indianola, Miss., for defendants.

MEMORANDUM OPINION

KEADY, Chief Judge.

This civil rights action brought against Drew Municipal Separate School District, its Trustees and Superintendent, seeks declaratory and injunctive relief to redress alleged deprivation of rights and privileges guaranteed by the Fourteenth Amendment to the Constitution, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.). Jurisdiction is invoked pursuant to 28 U.S.C. § 1343.

The complaint alleges that plaintiffs, Katie Mae Andrews and Lestine Rogers, both of whom are black females qualified to be employed as teachers' aides in the Drew public schools, were wrongfully denied employment because of a local policy which forbids employment of school personnel who are unwed parents. Plaintiffs contend that this policy or practice, which was promulgated and implemented by defendants, is violative of equal protection because it creates an unconstitutional classification to both race and sex. In addition, plaintiffs urge that the rule impermissibly impinges on their constitutional right to privacy.

Defendants steadfastly defend the reasonableness and necessity of the rule and insist that it applies equally to black and white, male and female.

The parties have presented evidence at extensive hearings[1] and by depositions, and supplied the court with excellent briefs, including those by participating amici,[2] on the legal issues presented. The case is now ripe for final determination on its merits. The relevant facts are disclosed by a brief review of the evidence.

Although the circumstances surrounding the denial of employment to Ms. Andrews and Ms. Rogers arise from

---

1. Subsequent to the filing of the complaint, plaintiffs moved for a preliminary injunction. An evidentiary hearing was held on March 16, 19 and 20, at the conclusion of which the court took the matter of preliminary relief under advisement, allowing the parties to submit briefs in support of their respective positions. The court, by order dated May 10, 1973, concluded that the issues had been substantially developed to enable to the court to dispose of the case on its merits after affording the parties a final opportunity to submit any additional evidence not previously presented. A final hearing was held on May 31, 1973.

2. Upon the motions of the Center for Constitutional Rights and the Equal Employment Opportunity Commission each was allowed to participate as amicus curiae and submit legal memoranda.

different factual settings (Ms. Andrews applied for a position as a teacher's aide and was never hired, while Ms. Rogers, though hired, was subsequently discharged), both plaintiffs were casualties of an unwritten edict issued in May 1972 by Superintendent Pettey to Ms. Fred McCorkle, the director of the teachers' aide program. Pettey had been informed by the Title I coordinator that the school district was employing several teachers' aides who were parents of "illegitimate" children. Disturbed by this report, the superintendent instructed Ms. McCorkle and other administrative personnel that contracts of employees in that category would not be renewed at the end of the current school year (1971-72), and parentage of an illegitimate child would henceforth disqualify prospective applicants from consideration for employment.[3]

When the superintendent's policy became effective in the spring semester of the 1971-72 school year, Ms. Rogers was then employed as a teacher's aide in the elementary school.[4] In August 1971, prior to her employment and in accordance with standard requirements, Ms. Rogers, a high school graduate, had filed an employment application, which was reviewed by Ms. McCorkle. Finding her

3. The complaint refers to the policy as precluding the employment of "unwed parents"; and although there was some conflicting testimony as to the scope of the rule as it was interpreted from Pettey's instructions, the evidence indicates that the policy was directed solely to employees who were parents of illegitimate children. The rule would not literally apply to *all* unwed parents (which presumably would include divorced parents, a parent whose spouse is deceased, or a single parent with an adopted child). However, the rule would be nonetheless applicable to a parent who, though presently married, entered matrimony only after begetting an illegitimate child.

4. As of the March 16 hearing, there were 33 teachers' aides employed in the Drew schools. Aides are normally hired on a year-to-year basis. Their primary responsibilities are to assist the elementary school teachers in directing activities in the classroom and supervising school children during recess periods.

qualified, Ms. McCorkle recommended the applicant for employment as an aide. Ms. Rogers was granted a year's contract, at a salary of $250 per month. On her employment application, Ms. Rogers had plainly indicated that her marital status was "single" and that she had one child.[5] This disclosure, though known to Ms. McCorkle, did not immediately hinder plaintiff's prospects for continued employment. Upon receiving the superintendent's instructions, however, Ms. McCorkle promptly notified Ms. Rogers and two other teachers' aides suspected of having illegitimate children that they would not be rehired for the succeding school year.[6]

Ms. Andrews, a college graduate certified to teach school in Mississippi, on December 18, 1972, applied to Ms. McCorkle for employment as a teacher's aide. A vacancy in this position for the ensuing spring semester existed when Ms. Andrews applied. The application which Ms. Andrews filled out in Ms. McCorkle's presence contained inquiries as to the applicant's marital status, to which plaintiff checked "single", and number of children, to which plaintiff responded "0". On the face of the application there was nothing to indicate that employment of Ms. Andrews would be contrary to the policy. To assure full compliance with Pettey's instructions, Ms. McCorkle routinely "investigated" the parentage status of

5. Unquestionably, plaintiff Rogers had one illegitimate child when she submitted her employment application in August 1971. Since her dismissal, Ms. Rogers has remained unmarried yet has given birth to a second child. Ms. Rogers and her children currently reside with her parents who aid in the care and support of their daughter and grandchildren.

6. Violet Burnett and Rosie Dean Mays, both of whom were also black female teachers' aides, were notified that their contracts would not be renewed because of the policy against unwed parents. Although Violet Burnett appeared as a witness, neither former school employee is a plaintiff in the present action.

applicants, in the course of which she learned that Ms. Andrews was the parent of an illegitimate child.[7] Upon receiving this information, Ms. McCorkle wrote on the Andrews' application, "single with a child 3 or 4 [years of age]", and did not further consider her for employment. In January 1973, Ms. McCorkle notified Ms. Andrews that she could not be considered for the position of teacher's aide because she was unwed parent. Ms. McCorkle then recorded a summary of her actions on the reverse side of the application as follows: "This applicant would have been hired in January 1973 if I had not received information from Mrs. Clara Robinson and others at James Elementary that she had a child. The applicant stated on her application that she was single and had no children, when she called by phone in January I informed her of the school policy and have had no contact with this applicant since then." Had Ms. Andrews been employed, her qualifications as a college graduate and holder of a certificate to teach in Mississippi's public schools would entitle her to a contract providing for a monthly salary of $450.

The challenged rule was without question the brainchild of Superintendent Pettey arising from long-held personal convictions concerning morality of school employees; and, should the occasion arise, the rule was not to be limited to teachers' aides or teachers, but equally applicable to any school employee having direct contact with

7. At the hearing, plaintiff Andrews frankly admitted that, though never married, she is the mother of a four-year old child. Plaintiff explained that she was reluctant to disclose this fact on her application because she knew that such a disclosure would preclude her employment under the superintendent's policy. Plaintiff and her child reside in Drew with plaintiff's mother, sister and two brothers.

students.[8] Pettey had not discussed the rule with the principals, teachers or school administrative personnel prior to its implementation. Nor had he obtained the prior approval of the Board of Trustees; indeed, the Board was first informed of the rule when the present action was commenced. The evidence shows, however, that the Board has since ratified the policy and the action taken against plaintiffs and other employees pursuant thereto. No white person has been found to be an unwed parent, and denied employment because of the stated policy.

According to Pettey, school personnel should be charged with the responsibility for the moral as well as the intellectual development of the enrolled students. Thus, the rationale of the rule was founded upon a considered opinion that: (1) the bearing of an illegitimate child, no matter when it took place, or under what circumstances, is conclusive proof of the parent's immorality or bad moral character, and therefore is a proper basis for precluding the employment of such persons in an educational environment, the need of a proper teacher model being regarded of especial value to "minority disadvantaged children"; and (2) the employment of a parent of an illegitimate child for instructional purposes materially contributes to the problem of schoolgirl pregnancies. The Drew public schools, which were desegregated by order of this court rendered May 28, 1969, in civil action GC 6731-S, are fully integrated as to faculty, staff and students. Of the

8. In February 1973 Betty Barnes, a black female who was a college graduate and occasionally employed as a substitute teacher at Hunter Junior High School, was notified by her principal that she could no longer teach because of the superintendent's policy. Ms. Barnes, at time of the hearing, was the unwed parent of a child seven months of age. Pettey testified that his mandate would likewise apply to secretaries, cafeteria workers and librarians; he was not certain as to the rule's applicability to bus drivers, maids, or school janitors.

total student enrollment of 1200, 80% are black, 20% are white. There are 28 schoolgirl pregnancies reported in the 1971-72 school year, and 13 in the current year.

Plaintiffs' principal argument is that a rule which classifies parents who are unwed differently from other persons, in the context of requirements imposed for employment in public schools, is violative of the Equal Protection Clause of the Fourteenth Amendment, whether the policy is judged by the traditional rational standard of review or by strict scrutiny required in the case of suspect classifications of sex and race. Another proposition advanced on behalf of plaintiffs is that the bearing of children is a matter of privacy which falls within the penumbra of personal rights protected by the Ninth and Fourteenth Amendments. Defendants deny that the policy, either facially or as applied, creates classifications based on sex or race, and assert that the rule passes constitutional muster as being reasonably related to educational purposes sought to be effectuated by them, and that this is accomplished without trespassing upon any right of privacy recognized by the Constitution.

The case is one of first impression. As indicated by briefs of counsel and from the court's own research, no court has ever been called upon to consider a rule or regulation of the character as the one promulgated for the Drew schools. During our evidentiary hearing, educational and psychological experts have presented differing views, mainly of a judgmental nature unsupported by any studies that provide a solid factual basis for their conclusions. These professional opinions, when simplified, rest either on the notion that an unwed parent is not likely to be a proper example for students, or, on the contrary view, that such parentage has absolutely no relationship

to the function and role of teachers or other employees in a public school system.

[1-4] This court readily recognizes that public school officials have the undoubted authority to adopt reasonable employee qualification criteria (including the possession of good character traits) applicable to administrators, teachers, staff and public school employees generally. It is also acknowledged that, subject to constitutional and statutory limitations, school officials are to be afforded leeway in imposing employee qualifications to suit the particular needs of the school or school district involved. Certainly, no school administrator or board should be precluded from denying employment to any one determined to be of bad moral character upon a fair and unbiased consideration of pertinent information, and we do not make the slightest intimation otherwise.[8a] After a careful review of Drew's policy and the relevant evidence, however, we hold that the policy or practice of barring an otherwise qualified person from being employed, or considered for employment, in the public schools merely because of one's previously having had an illegitimate child has no rational relation to the objectives ostensibly sought to be achieved by the school officials and is fraught with invidious discrimination; thus, it is constitutionally defective under the traditional, and most lenient, standard of equal protection and violative of due process as well. Alternatively, the policy, both inherently and as applied, constitutes an impermissible, discriminatory classification based upon sex. We find it unnecessary to reach the issues of race and privacy raised in argument.

8a. By Miss.Code § 37-9-59, a school superintendent is empowered to remove or suspend a teacher "*for immoral conduct* or other good cause" after the teacher is given written notice of the charges, and is afforded an opportunity for a public hearing. (Emphasis added).

In an unbroken line of decisions, the United States Supreme Court has consistently applied the Equal Protection Clause to strike down statutes, regulations, and rules of a state found to be unconstitutional because of arbitrary and irrational classifications. The traditional standard of review was clearly and succinctly summarized in Rinaldi v. Yeager, 384 U.S. 305, 308-309, 86 S.Ct. 1497, 1499, 16 L.Ed.2d 577, 580 (1966) in these words:

> "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. * * * It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact * * * to be treated in law as though they were the same.' * * * Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'"

Only recently, the Supreme Court applying the traditional standard of equal protection review in Reed v. Reed, 404 U.S. 71, 75, 92 S.Ct. 251, 254, 30 L.Ed.2d 225, 229 (1971), invalidated an Idaho statute that preferred a male over a female applicant of the same class in the appointment as administrator of a decedent's estate. Chief Justice Burger, writing for a unanimous court, reaffirmed that:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object

> of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989, 990 (1920)."

[5] It is also a well-settled constitutional principle that a state cannot exclude a person from a profession or occupation in a manner or for reasons that contravene the Due Process Clause or the Equal Protection Clause. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). *Schware* may be regarded as a prominent landmark in this field since the case dealt with a state's requirements for admission to practice law, a profession affected with as much, if not more, public interest than teaching school, and one long subject to statutory regulation. In *Schware*, the Court reversed a decision that a bar applicant in New Mexico should not be permitted to take the bar examination in view of his past membership in the Communist Party, his use of aliases and his record of arrests. With respect to the demands of equal protection, the Court held:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, *but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.*" 353 U.S. at 239, 77 S.Ct. at 756 (Emphasis added).

The Court held that the refusal of the New Mexico Board of Bar Examiners to consider evidence of the applicant's present good character and its reliance solely upon inferences drawn from conduct which occurred many years before violated the Fourteenth Amendment, and was offensive to both equal protection and due process. Justice Frankfurter, concurring, noted that "the judgment here

challenged involves the application of a conception like that of 'moral character', which has shadowy rather than precise bounds," and concluded that a "refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason" contravened the Due Process Clause.[9]

Defendants may gain nothing from the argument that no one has a constitutional right to teach in public schools since that "is only to say that [a person] must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities." Slochower v. Board of Education of New York, 350 U.S. 551, 555, 76 S.Ct. 637, 639, 100 L.Ed. 692, 699 (1956). "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, 385 U.S. 589, 605-606, 87 S.Ct. 675, 685, 17 L.Ed.2d 629, 642 (1967); Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

The unconstitutional vice of the policy, as understood and enforced by Pettey, is that it conclusively presumes the parent's immorality or bad moral character from the single fact of a child born out of wedlock.[10] By the

---

9. *Schware* was applied by us in Lipman v. Van Zant, 329 F.Supp. 391 (3-judge, N.D.Miss.1971), to invalidate a one-year durational residency requirement for a bar applicant to take the Mississippi bar examination on the ground that such residency was wholly unrelated to the state's interest in securing a capable and competent bar.

10. An extract from the superintendent's testimony reads as follows:

"THE COURT: Mr. Pettey, you do not think the facts or circumstances under which an illegitimate birth occurred [are] at all relevant to the issue of good character or bad character?

(Continued on following page)

rule, a parent, whether male or female, who has had such a child, would be forever precluded from employment. Thus, no consideration would be given to the subsequent marriage of the parent or to the length of time elapsed since the illegtimate birth, or to a person's reputation for good character in the community. A person could live an impeccable life, yet be barred as unfit for employment for an event, whether the result of indiscretion or not, occurring at any time in the past. But human experience refutes the dogmatic attitude inherent in such a policy against unwed parents. Can it be said that an engaged woman, who has premarital sex, becomes pregnant, and whose fiance dies or is killed prior to their marriage, is morally depraved for bearing the posthumous child? The rule allows no compassion for the person who has been unwittingly subjected to sexual relations through force, deceptive design or while under the influence of drugs or alcohol, yet chooses to have the child rather than to abort it. The rule makes no distinction between the sexual neophyte and the libertine. In short, the rule leaves no consideration for the multitudinous circumstances under which illegitimate childbirth may occur and which may have little, if any, bearing on the parent's present moral worth. A past biological event like childbirth out

---

Footnote Continued—

THE WITNESS: No, sir. That would be hard to get at. I think the fact that the birth occurred without the benefit of matrimony is, to me, proof enough of the—

THE COURT: Is conclusive?

THE WITNESS: Yes, sir.

* * *

THE COURT: . . . Suppose a woman had an illegitimate child and then later married either the father of the child or another man. When she presented herself to you she showed she was married and had a child, one child. Would you consider her for employment?

THE WITNESS: No, sir, I would not.

of wedlock, even if relevant to the issue, may not be controlling; and that it may be considered more conventional or circumspect for the infant to be surrendered to others for upbringing rather than be reared by the natural parent is hardly determinative of the matter. Furtheremore, the policy, if based on moral judgment, has inherent if unintended defects or shortcomings. While obviously aimed at discouraging prematerial sex relations, the policy's effect is apt to encourage abortion, which is itself staunchly opposed by some on ethical or moral grounds.[11] It totally ignores, as a disqualification, the occurrence of extramarital sex activity, though thought of by many as a more serious basis for moral culpability.[12] Indeed, the superintendent's fiat, altogether unsupported by sociological data, equates the single fact of illegitimate birth with irredeemable moral disease.[13] Such a presumption is not only patently absured, it is mischievous and prejudicial, requiring those who administer the policy to "investigate" the parental status of school employees and prospective applicants. Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it.

[6] Granted that many unwed parents may be bereft of morality, and thus unfit for employment in public schools, the policy nonetheless does also bar those persons who, though unwed parents, may have unquestionably good character and high qualifications of job fitness. Since

11. See majority opinion by Mr. Justice Blackmun, in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, 166, especially Fn. 22 and 23.

12. Seventh Commandment: Thou shalt not commit adultery. 20 Exodus 14.

13. In its quest for understanding the court allowed counsel substantial latitude in presenting evidence, as the transcript will show, and rejects a plenitude of material proffered by both sides as irrelevant to the case.

the rules operates arbitrarily and capriciously to prevent certain persons from receiving employment consideration, it constitutes an invidious discrimination and is violative of equal protection. The fact that the two plaintiffs, Ms. Andrews and Ms. Rogers, were either discharged or not considered for employment, without any inquiry whatsoever into their present good moral character but solely because of the stated policy, constitutes a denial of their due process rights.

In Perry v. Grenada Municipal Separate School District, 300 F.Supp. 748 (N.D.Miss.1969), this court applied the foregoing principles to a somewhat analogous case. In *Perry*, the court struck down a school board policy which excluded unwed mothers from admission to high school as violative of equal protection and due process. Judge Orma R. Smith wrote (p. 753): "[T]he fact that a girl has one child out of wedlock does not forever brand her as a scarlet woman undeserving of any chance for rehabilitation or the opportunity for future education."

Although never faced with the precise question of excluding unwed parents as teachers or students in public schools, the Supreme Court, in its recent decision of Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), reiterated in the plainest terms the constitutional impermissibility of using presumptions which offend equal protection and due process. By an Illinois statute, children of unwed parents became wards of the state upon the death of their mother, thus excluding any right in the natural father to obtain their custody. The statute conclusively presumed the father of an illegitimate child to be an unfit parent, without affording him opportunity to prove his fitness. The Court held this statute to be violative of both equal protection and due process. Acknowledging that Illinois had a legitimate interest in protecting

the moral well-being of a minor child and in strengthening the child's family ties, the Court, speaking through Mr. Justice White, emphasized:

> "[W]e are not asked to evaluate the legitimacy of the state *ends*, rather, to determine whether the *means* used to achieve these ends are constitutionally defensible. . . . It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him." (405 U.S. at 652, 654, 92 S.Ct. at 1213) (Emphasis added).

[7] As a second rationale for their rule, defendants urge that the mere presence of an unwed parent in an educational environment may likely adversely affect the morals of school children and enhance the likelihood of schoolgirl pregnancies. Assuming that libido can be taught in the classroom, there is no evidence that plaintiffs or others were attempting or would have attempted to proselytize students. To the contrary, plaintiffs have never attempted to publicize their parental status. Thus, defendants' reliance on McConnell v. Anderson, 451 F.2d 193 (8 Cir. 1971) is not well placed. In *McConnell*, the Eighth Circuit upheld the University of Minnesota Board

of Regents' refusal to employ a self-avowed gay activist whose attempted "marriage" to a fellow homosexual had attracted wide media coverage.

[8] Defendants express serious concern about the importance of employee role modeling; that is, they assert it is imperative for teachers as well as other school employees to project a "proper" image to students of impressionable age. We are compelled to once again emphasize that the record is devoid of evidence of proselytization. In the absence of overt, positive stimuli to which children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative. We are not at all persuaded by defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private family lifestyles of teachers or other adults within a school system (i. e., whether they are divorced, separated, happily married or single, etc.), and, when known, will approve of and seek to emulate them.

[9] Finally, counsel for defendants urge that, quite apart from any notion of morality, the policy permissibly seeks to regulate a "status" situation, but, if so, "parental status" as a basis of classification is no less offensive to the Fourteenth Amendment than religious or racial status classifications or other groupings arbitrarily and unreasonably made by or on behalf of the state.

An additional, alternative ground of our decision is that, assuming a rational relation does exist between the Drew policy and legitimate educational objectives, the rule creates an inherently suspect classification based on sex, i. e., single women, which cannot survive strict scrutiny mandated by the Fourteenth Amendment.

We note that only unmarried females have been prohibited from employment under the policy; and it is self-evident that the rule can only be applied against them. Although the rule professes to be neutral, proscribing employment of any parent, male or female, of an illegitimate child, the rule cannot operate that way. Unless the man either admits paternity or is so adjudged judicially, it is virtually impossible to prove his involvement. Nature does not readily, if ever, identify the offspring's sire. A woman, however, is impregnated, gives birth, and often raises the child alone. Mr. Pettey freely conceded that mothers of illegitimate children are easier to discover than fathers because, in his words "the unwed mother is stuck with the result." Further, although Ms. McCorkle emphatically stated that she would apply the rule equally to both male and female, when asked how she knew that a certain male teacher's aide had not fathered an illegitimate child, she replied, "because he is married."

Plaintiffs contend that the birth of a child is not an immoral or illicit event, but rather a biological and physiological fact. Thus, the true intent of the rule is, or logically should be, directed to the practice of premarital coitus, of which pregnancy and eventual childbirth is mere evidence. If such be the case and morality is the true issue, plaintiffs contend that the regulation, to be constitutional, must be equally burdensome against male employees who may participate in such "immoral" acts.[14] We must agree, and under strict review now mandated for sex-based classification, the obvious distinction in the rule's applicability is not constitutionally justified. Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d

14. We do not express any view concerning a regulation respecting pregnancy of a classroom teacher during the school term, as such a case is beyond the scope of this opinion.

583 (1973). In *Frontiero*, a married woman Air Force officer sought coequal housing and medical benefits for her dependent husband under federal statutes which disallowed such benefits to a woman officer who provided less than one-half of her spouse's support. The statutes automatically granted male officers such benefits for their dependent wives without consideration of percentage of support. In holding the statutory scheme constitutionally invalid, because of the special burden imposed upon female officers over males similarly situated, the Supreme Court ruled that "classifications based on sex, like classifications based on race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 93 S.Ct. at 1771.[15]

Defendants argue that when a single woman engages in premarital sexual relations, becomes pregnant and begets an illegitimate child, she voluntarily places herself

15. Mr. Justice Brennan, speaking for the Court in *Frontiero*, declared:

> "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage.
>
> . . . . .
>
> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .' Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." 93 S.Ct. at 1769.

in a classification in which men are not similarly situated, and hence, a regulation which treats such women differently is justified. The rule, however, is directed to parents of illegitimate children, and, save artificial insemination, a male who sires an illegitimate child is equally the partner to the sexual act and is equally the parent of the child, even though the mother may be "stuck with the result." Voluntariness of a classification is certainly not an issue. In *Frontiero,* more burdensome treatment of a married woman officer in the armed services, although it was no doubt her voluntary choice to take connubial vows, was not tolerated.

The essentially discriminatory effect of the Drew policy upon unmarried women is inescapable. Although stated in another context but expository of what we believe to be the truth here controlling are the words of Chief Justice Burger, dissenting in Stanley v. Illinois:

> "In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood." 405 U.S. at 665, 92 S.Ct. at 1220.

[10] Where a state has adopted a suspect classification like sex, it "bears a heavy burden of justification". McLaughlin v. Florida, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964). "In order to justify the use of a suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification 'necessary

to the accomplishment' of its purpose or the safeguarding of its interest." Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973). The defendants in the case sub judice have made no showing whatever that their policy against employing unwed parents serves a compelling state interest or is necessary for the operation of an educational program. Hence, the policy cannot survive strict judicial scrutiny.

Judgment for plaintiffs shall be entered in accordance with this Opinion.